STATE OF MICHIGAN

COURT OF APPEALS

JOY S. SHELTON, JULIANNE H. COOK, BEVERLY A. BLUE, WILLIE J. RICHARDSON, JUDITH P. THOMPSON, JUNE E. FEENEY, RENEE DANIEL, DIANE COOLEY, DANIEL SOZA, ROBERT FLEMING, and JOSE GURULE,

Plaintiffs-Appellants,

v

DELTA COLLEGE, a Community College District, and PETER D. BOYSE, KAREN M. MacARTHUR, HAROLD D. ARMAN, BETTY J. JONES, JUDITH A. THORSEN, DARRELL R. BERRY, RUBY IWAMASA, JOHN A. FULLER, ROBERT L. EMRICH, RUTH M JAFFE, VELMA A. PHILLIPS, MARIAM R. PURDUE, PAUL A. ROWLEY, FRANCIS G. RUHL, R. EARL SELBY, ROBERT DOLINSKI, ROBERT G. CABELLO, JOHN KRAFFT, GENE PACKWOOD, and JACK JONKER, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
July 13, 1999

No. 206916
Saginaw Circuit Court
LC No. 94-005222 CZ

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Plaintiffs, all present or former employees of defendant Delta Community College, appeal from the trial court's entry of judgment on the jury's verdict of no cause of action in this case involving claims of disparate treatment, disparate impact, and failure to promote, all in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. We affirm.

Faced with a possible $2 million deficit for the fiscal year 1994-1995, college officials made drastic cuts in its budget. Although virtually every employee of the college was affected by these cuts, the eleven plaintiffs, each of whom was a member of at least one protected class under the CRA, suffered decreases in salary (from 4% - 60%), and/or contract length (from twelve to nine or ten months). Plaintiffs brought the instant action alleging disparate treatment, disparate impact, and failure to promote. After a nine-day trial, the jury returned a verdict of no cause of action. This appeal followed.

I

Plaintiffs raise several challenges to the jury instructions given by the trial court, none of which has merit.

A

Plaintiffs first argue that the trial court erred in instructing the jury that a member of two protected classes is entitled to no greater protection under the law than a member of one protected class. Plaintiffs fail to cite, nor have we found, authority for the proposition that a person who falls within more than one protected class is entitled to "extra" protection than one who is a member of only one protected class. Moreover, we find that under plaintiffs' theory, persons in two or more protected classes would in effect be entitled to preferential treatment, which is itself a violation of the CRA. *Farmington Education Ass'n v Farmington School Dist*, 133 Mich App 566, 575-576; 351 NW2d (1984).

B

Plaintiffs also challenge the trial court's giving of the following instruction, which is based on SJI2d 105.04:

> I'm still talking about the disparate treatment theory. Plaintiff has the burden of proving that, A, defendants cut the plaintiffs' pay and, B, race, color, national origin, age or sex was one of the motives or reasons which made a difference in determining to cut the plaintiffs' pay. . . .

Because plaintiffs failed to object to this instruction at trial, they are not entitled to review of this challenge absent manifest injustice. *Janda v Detroit*, 175 Mich App 120, 126; 437 NW2d 326 (1989).

Contrary to plaintiffs' argument on appeal, mere evidence of an adverse employment action, standing alone, is insufficient to establish a disparate treatment claim. The instruction correctly states that plaintiffs bore the burden of presenting evidence of a discriminatory motive behind the adverse employment action at issue. See *Wilcoxon v Minnesota Mining & Mfg Co*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 204431, issued April 23, 1999); *Harrison v Olde Financial Corp*, 225

Mich App 601, 612; 572 NW2d 679 (1997).[1] The trial court's decision to read this instruction to the jury did not result in manifest injustice.

C

Plaintiffs next challenge the trial court's refusal to give the following instruction regarding the significance of standard deviations with regard to their disparate impact claim:

> In disparate impact discrimination cases, an employment practice may be deemed violative of the Elliot-Larson Act where the employment practice has a statistically significant adverse impact on members of a protected group, an adverse result statistically significant where the disparity between the the [*sic*] expected result and the actual result takes two to three standard deviations.

It is generally true that a showing of two to three standard deviations allows the plaintiffs to overcome a hypothesis that the result was random, thus establishing a prima facie case of disparate impact discrimination. *Hazelwood School Dist v United States*, 433 US 299, 309 n 14; 97 S Ct 2736; 53 L Ed 2d 768 (1977). However, plaintiffs' instruction also suggests that if plaintiffs demonstrated a given standard deviation, they win. This is not a correct statement of the law. To the contrary, if plaintiffs established a prima facie case of disparate impact, defendants were then required to meet their burden of showing that the practice at issue had a manifest relationship to their stated business goals. *Smith v Consolidated Rail Corp*, 168 Mich App 773, 776; 425 NW2d 220 (1988). Consequently, we find that the trial court's rejection of this potentially misleading instruction was not an abuse of discretion.

D

Plaintiffs' final challenge to the jury instructions is to the trial court's refusal to give SJI2d 6.01(a) in relation to plaintiff Thompson's failure to promote claim. Again, we find no error in the trial court's ruling.

Defendants presented the testimony of Judith A. Thorsen, the Vice President of Business and Finance at the college, who described her observation of the selection process which ultimately resulted in the hiring of a man for the Director of Technology position sought by Thompson. Defendants did not call any of the search committee members to testify. Plaintiffs argue that because defendants did not call any members of the search committee to corroborate Thorsen's account of the selection process, they were entitled to have SJI2d 6.01(a) read to the jury. This instruction is as follows:

> The [*plaintiff/defendant*] in this case has not offered [*the testimony of* [*name*] / [*identify exhibit*]]. As this evidence was under the control of the [*plaintiff / defendant]* and could have been produced by [*him / her*], and no reasonable excuse for the [*plaintiff's / defendant's*] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the [*plaintiff / defendant*].

In rejecting this instruction, the trial court determined that the members of the search committee were equally available to both parties. We agree.

The mere fact that the committee members were employed by defendants did not necessarily require the conclusion that they were solely under defendants' control. This is particularly true here, where one of the committee members was present in the courtroom for much of the trial. See *Gibbons v Delta Contracting Co*, 301 Mich 638; 4 NW2d 39 (1942). Moreover, defendant had no duty to call every possible witness within its reach as part of its defense. *Macklem v Warren Construction Co*, 343 Mich 334, 338; 72 NW2d 60 (1955). We will not penalize defendants for their strategy decision to not present corroborating witnesses to bolster Thompson's testimony, particularly where the additional witnesses were equally available to plaintiffs.

E

We have carefully reviewed the jury instructions in their entirety, *Nabozny v Burkhardt*, 233 Mich App 206, 217; 591 NW2d 685 (1998), and hold that the applicable law was adequately and fairly presented to the jury. Accordingly, we find no basis for reversal on this ground.

II

Plaintiffs next challenge the trial court's denial of their motion for judgment notwithstanding the verdict on their claim of disparate impact. Because plaintiffs fail to support their position with cogent argument and relevant citations to authority, we decline to address it. See *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1998) (A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim"). However, we briefly note that where, as here, reasonable minds could have honestly reached different conclusions regarding plaintiffs' disparate impact claim, the jury's verdict must stand. *Central Cartage v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

III

Plaintiffs argue that the trial court improperly curtailed their cross-examination of Peter Boyce, president of Delta Community College, regarding the alternative plan of cutting only the salaries of those employees with poor performance records. A careful review of the record reveals that plaintiffs were not prohibited from questioning Boyce regarding whether performance-based pay cuts would have been an acceptable alternative that would have accomplished the same business-related goals of the college. Accordingly, we find no abuse of discretion here.

IV

Plaintiffs next argue that they are entitled to a new trial because of several errors, including allegations of jury misconduct, attorney misconduct, and various evidentiary errors.

A

We agree with the trial court that plaintiffs have waived the issues of juror and attorney misconduct for failing to raise them in a timely manner in the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Plaintiffs may not keep silent during trial regarding such matters, only to raise the issues in the event of an adverse verdict. Moreover, any possible prejudice stemming from the alleged misconduct could have been cured by timely instructions. See *People v Stanaway*, 446 Mich. 643, 687, 521 NW2d 557 (1994).

B

Plaintiffs' challenge to the trial court's striking of plaintiffs Cooley and Gurule's constructive discharge is moot. Because the jury determined that defendants were not guilty of discrimination in violation of the CRA, there is no need to address the issue of whether Cooley's and Gurule's reductions in pay constituted a constructive discharge. See *Smith v Kowalski*, 223 Mich App 610, 619; 567 NW2d 463 (1997).

C

Regarding plaintiffs' remaining claims of evidentiary error, our review of the record convinces us that the trial court's rulings do not constitute an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995).

Affirmed.

/s/ William B. Murphy
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

[1] In the present case, plaintiffs properly relied on statistics to support the inference that their reduction in hours and pay was a result of a discriminatory intent. See *Armington Education Ass'n v Farmington School Dist*, 133 Mich App 566, 571; 351 NW2d 242 (1984) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment").